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Invoking Force Majeure Clause in the Times of Covid-19

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ABSTRACT

COVID-19 also known as a novel corona virus is a spillover event, with its epicenter in China. Covid-19 eventually became a major global health concern due to its pathogenicity which has given an unprecedented distress to the economies around the globe. The Covid-19 pandemic while causing major loss of life has adversely affected business, trade and commerce, i.e., the commercial world. When two parties enter into an agreement to trade with each other, a contract is formed between them. However on account of this pandemic, party would not be able to perform their contractual obligations and the contract become impossible to perform and in such circumstances many contracts will be deferred, suspended or even terminated. Under such scenarios, the force majeure clause would be a determining factor to protect parties from such breach. "Force majeure refers to a clause that's inserted in contracts to terminate burden for inevitable catastrophes that interrupt the expected course of events and prevent parties from fulfilling obligations." A force majeure clause may incorporate an exhaustive list of events such as Act of God or other acts as may included by the parties in the contract prior to its execution. It is pertinent to note that the force majeure clause did include 'epidemics' in number of contracts between the parties and after analysis of such circumstances, the Ministry of Finance, Government of India along with other ministry by virtue of its Office Memorandum has declared that the spread of Covid-19 falls within the definition of 'Act of God' as a 'natural calamity' and to spread force majeure Section 32 and 56 of the Indian Contract Act, 1872 has to be read.

I. INTRODUCTION

In the recent months, Republic of India went from a do-not-panic state to a state of complete lock down. Corona virus is spreading like wildfire and every single day the cases of corona are increasing at an alarming speed. If we see the recent report, then at present, there are 1 Lac+ cases in India who tested positive and there are 3000+ cases that are dead from this virus.

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Reuters in its report, states India could face 1.3 million confirmed positive cases of corona virus by mid-may if it continues to spread at its current pace. This pandemic has not just resulted in loss of lives but has had an adverse impact on business, trade and commerce. Therefore, it has its varied implications on the commercial world.

While every person are locked themselves inside their house for safety concerns of themselves and their family and society, the market has witnessed record falls and business and company are on a downward spiral. Furthermore, country wide lockdown, travel restrictions, social distancing and quarantines measures have lead to a sharp fall in consumer and business spending producing a recession. So during such a tough times, there are several legal aspects that all companies and businesses should bear in mind while mitigating the risk and cut down on their losses.

So there are several dimensional propositions which are essential to be followed by every company at the moment, which are-

- Protect and Protocol
- Liquidity and Plan
- Pay taxes
- Review the Contract
- Logistic and Supply Chain
- Luring the market
- Force Majeure Clause

*In this research paper, the authors are focusing on one of the above head which is a “**Force Majeure Clause**”.*

The impact on the companies and businesses has been severe, and the force majeure clause will play a vital role if the businesses will not be able to perform their contractual obligations amidst this crisis. In the aftermath of the closedown, many suppliers would not be able to perform their contractual obligations and, to say the least, they would be delayed. The suppliers are seeking to delay or avoid contractual obligations. They wish not to be held liable for breach of their contractual non- performance. The companies might not be able to credit their customer agreements. The same is true for the consideration, which either of the party to a contract might not be able to fulfill under the terms of the contract. Under such scenarios, the spread of force majeure clause would be a determining factor to understand the implications of these types of

events. In such a circumstance, a question may arise whether a Force Majeure clause in a particular contract excuses parties from performing their obligations. The answer would depend on the conditions and the drafting of the relevant contractual provisions i.e. the Force Majeure clause and the interpretation thereof.

II. CONCEPT OF FORCE MAJEURE

During the time, the Companies are worried about the consequences of non-fulfillment of their contractual obligations. But to avoid this trouble there is a provision that protects companies from such breach is the '*force majeure clause*' which means "***Force majeure refers to a clause that is mentioned in contracts to remove accountability for natural and unavoidable catastrophes that disrupt the expected course of events and prevent parties from fulfilling obligations***³."

Force Majeure' is a French term that literally means '*a superior force*' or '*greater force*'. As per *Black's Law Dictionary*, 'Force-Majeure' can be defined as "an event or an act that can be neither anticipated nor controlled⁴. It is related to the phrase of an *Vis Major* / '*Act of God*' (*Contractual language referring to an Act of God are known as force majeure clauses*), an event for which no party can be held liable, *such as a hurricane or at present we can say Corona virus*. Force majeure also encompasses human activities, such as armed conflict. Generally speaking, for events to constitute force majeure, they must be unforeseeable, must be outside of parties to the contract, and unavoidable⁵.

Force majeure clauses can usually be found in various contracts such as power purchase agreements, supply contracts, manufacturing contracts, distribution agreements, project finance agreements, agreements between real estate developers and home buyers, etc. This provision is important for businesses as it relieves the parties from performing their respective obligations and which are to be undertaken under the contract and consequential liabilities, during the period that force majeure events continue provided that the conditions for clause to become applicable are met⁶.

³ Marshall Hargrave, Force Majeure, Investopedia, (Apr. 17, 2020, 12 PM), <https://www.investopedia.com/terms/f/forcemajeure.asp>.

⁴ Gaurang Kanth, Force Majeure and the Covid-19 pandemic, *The Statesman*, (Apr. 30, 2020, 11:11 AM), www.thestatesman.com/supplements/law/force-majeure-covid-19-pandemic-1502882338.html.

⁵ Marshall Hargrave, Force Majeure, Investopedia, (Apr. 17, 2020, 12 PM), <https://www.investopedia.com/terms/f/forcemajeure.asp>.

⁶ Poorvi Sanjanwala and Kashmiri Bakliwal, What is force majeure? The legal term everyone should know during Covid-19 crisis, *Economic Times*, (May 21, 2020, 10.42 AM), <https://economictimes.indiatimes.com/small-biz/legal/what-is-force-majeure-the-legal-term-everyone-should-know-during-covid-19-crisis/articleshow/75152196.cms>.

A company may embed a force majeure clause into a contract to pardon itself from the risk in the event of which it cannot fulfill the terms of a contract (or if attempting to do so will result in loss or damage of goods) for reasons beyond its control⁷. Force majeure aims at exempting a party from a contract which has become impossible for performance, due to intervention of a superior force. The concept of force majeure has gained impact in the present situation. In general, the judicial response to the doctrine of force majeure has been rigid. The Hon'ble Supreme Court in the *Dhanrajmal Gobindram vs. Shamji Kalidas* case has held that the term force majeure is of wider importance. Judges in the precedent have agreed that where the reference is made to force majeure, the intention is to save the performing party from the consequences from the anything over which he has no control⁸.

The foundation of any business or commerce is the contracts entered between the parties. Indian Contract Act, 1872 lays down the obligations of the parties. According to **Section 37 of the Indian Contract Act, 1872**, '*The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or exempt under the provisions of this Act, or of any other law*'.⁹ On account of this pandemic, the situations may emerge in a catena of commercial contracts wherein a party, without any fault on its part, is not able to perform its part of the contract. So during the time of pandemic to protect the parties to the contract the spread of force majeure clause can be considered¹⁰.

For example- The pandemic Covid-19 affected the whole world, causing complete lock down worldwide, restrictions on travelling which is causing long delays to fulfill the contractual obligations by the companies or businessman and leading the client to sue for damages, so in this case, the companies or businessman might employ a force majeure clause as a defense arguing that the pandemic was an unforeseeable, external and unavoidable event.

A. CONSEQUENCES INCLUDED IN FORCE MAJEURE-

Depending on their drafting in the contract, such clauses may have a array of consequences, including:

- i.** Excusing the affected party from performing the contract in whole or in part;
- ii.** Excusing that party from delay in performance

⁷ Definition by Merriam Webster Dictionary, www.merriam-webster.com/dictionary/force%20majeure.

⁸ **Dhanrajmal Gobindram vs. Shamji Kalidas, (1961) 3 SCR 1020.**

⁹ Indian Contract Act, 1872, No. 09, Acts of Parliament, 1872 (India).

¹⁰ Tarun Dua and Geetanjali Sethi, India: Force Majeure In Times Of COVID-19: Challenges And The Road Ahead. Mondaq (May 11, 2020), www.mondaq.com/india/litigation-contracts-and-force-majeure/930674/force-majeure-in-times-of-covid-19-challenges-and-the-road-ahead.

- iii. Entitling the party to postpone or claim an extension of time for performance; or
- iv. Giving that party a right to terminate or discharge themselves from that contract¹¹.

B. CONSEQUENCES NOT INCLUDED IN FORCE MAJEURE-

Force majeure is in general intended to include occurrences beyond the reasonable control of the parties, and therefore *would not cover*:

- i. Any result of the negligence of a party, which has a materially adverse effect on the ability of such party to perform its obligations.
- ii. Any result of the usual and expected consequences of external forces.
- iii. Any circumstances those are specifically included in the contract¹².

C. ESSENTIAL INGREDIENTS-

The essential elements of force majeure clauses are as follows:

- i. An unexpected/unforeseen intervening event happened;
- ii. The parties to the agreement assumed that such an event won't happen;
- iii. Such an event has made the performance of the obligations under the contract impossible;
- iv. The parties have taken every single such measures to perform the obligations under the agreement or at least to lessen the damage; and
- v. The affected party claiming relief under force majeure will have the burden of proof to prove that the force majeure event has affected such party's performance of the contract¹³.

From contractual perception, a force majeure clause provides temporary reprieve to a party from performing its obligations under a contract upon occurrence of a force majeure event. Whether the outbreak of Covid-19 and the consequent lockdowns ordered by the Central and State Governments would be adequate to invoke the force majeure clause in the contract would depend on the following factors:

¹¹ Faye Moore, Will Covid-19 trigger a force majeure clause?, Pinsent Masons, (Mar. 26, 2020, 110:41 AM), <https://www.pinsentmasons.com/out-law/guides/covid-19-force-majeure-clause>.

¹² Public-Private-Partnership Legal Resource Center, World Bank Group, (Oct. 2012), <https://ppp.worldbank.org/public-private-partnership/ppp-overview/practical-tools/checklists-and-risk-matrices/force-majeure-checklist>.

¹³ Tarun Dua and Geetanjali Sethi, India: Force Majeure In Times Of COVID-19: Challenges And The Road Ahead. Mondaq (May 11, 2020), www.mondaq.com/india/litigation-contracts-and-force-majeure/930674/force-majeure-in-times-of-covid-19-challenges-and-the-road-ahead.

- i. Establishing the causal connection between the force majeure event and difficulty to the performance of the contract;
- ii. Harmonious construction with all the related provisions; and
- iii. Compliance with the condition precedents contained in the force majeure clause¹⁴.

III. HOW FORCE MAJEURE DEALT UNDER INDIAN STATUTES

Force Majeure is time and again mixed up with Doctrine of Frustration. But these are entirely different concepts. The concept of Force Majeure has neither been defined nor dealt under the Indian statutes. A force majeure clause is a contractual provision which alters the rights and obligations of parties to the contract due to the occurrence of unusual events beyond their control which prevents the parties from fulfilling their obligations¹⁵. However, the legislators have to some extent dealt with this concept as it is clear from *Section 32 and 56 of the Indian Contract Act, 1872*.

A. TYPES OF FORCE MAJEURE CLAUSES IN CONTRACTS

Force majeure clauses in contracts usually implement three broad approaches to defining what type of event may excuse a party from its contractual obligations:

- i. *Specific language*: It may include specific events such as war, terrorism, acts of government, act of god, etc.
- ii. *General language*: Such clauses usually end with words like ‘beyond the reasonable control of parties’ to be a force majeure event.
- iii. *Combination of specific and general language*: More common type of clauses would contain both the specific as well as the general or residuary language¹⁶.

B. LEGISLATIONS RELATED TO FORCE MAJEURE CLAUSES

- *Section 32 of the Indian Contract Act, 1872- Enforcement of contracts contingent on an event happening*¹⁷

¹⁴ Poorvi Sanjanwala and Kashmira Bakliwal, What is force majeure? The legal term everyone should know during Covid-19 crisis, Economic Times, (May 21, 2020, 10.42 AM), <https://economictimes.indiatimes.com/small-biz/legal/what-is-force-majeure-the-legal-term-everyone-should-know-during-covid-19-crisis/articleshow/75152196.cms>.

¹⁵ Khaitan & Co., Covid-19: A Force Majeure Event?, Lexology, (Apr. 15, 2020, 1 PM), <https://www.lexology.com/library/detail.aspx?g=d77ca90f-e8e7-44a7-9e4a-f475ccc5b9ab>.

¹⁶ Ibid.

¹⁷ *Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened. If the event becomes impossible, such contracts become void.*

Essential Ingredients-

- *Depends on happening of an event;*
- *The event must be uncertain;*
- *The event should be collateral to the contract;*
- *The event should not be a mere will of the promisor.*
- **Section 56 of the Indian Contract Act, 1872- Agreement to do impossible act¹⁸.**

Essential Ingredients-

- There must be a valid contract between the parties;
- The performance of the contract is yet to be made or is continuing in nature; and
- The contract after it is entered becomes impossible by way of fact or law to be performed;
- The impossibility is by reason of some events which the promisor could not prevent;
- *The impossibility should not be a mere will of the promisor or due to his negligence.*

Propounding the law of frustration, the Hon'ble Supreme Court of India in **Satyabrata Ghosh Vs. Mugneeram Bangur & Co.**, held that the word "impossible" has not been used with respect to physical or literal impossibility. To determine whether the contract is frustrated, it is not necessary that the performance of an act should literally become impossible, a mere impracticality of performance, from the point of view of the parties, and considering the object of the agreement, will also be covered. Where an unexpected occurrence in circumstances decimates the very objective of the contract the same may be considered as "impossibility" to do as agreed¹⁹.

After analyzing the ingredients of *Section 32 and Section 56 of the Indian Contract Act, 1872*,

¹⁸ *Contract to do an act afterwards becoming impossible or unlawful- A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.*

Compensation for loss through non-performance of act known to be impossible or unlawful- Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non performance of the promise.

¹⁹ **Satyabrata Ghosh Vs. Mugneeram Bangur & Co. (1954) SCR 310(12).**

the authors found that it is important to note that where the contract itself, as a matter of construction, contains impliedly or expressly a term according to which it would stand discharged on the happening of certain circumstances, the question of termination of the contract according to its term falls to be determined under *Section 32 and not under Section 56 of the Indian Contract Act, 1872*. Under the English law, they are all treated as cases of frustration, but under the Indian law such cases *would fall under Section 32, which deals with contingent contracts*.

In the absence of a force majeure clause, any party could also raise the doctrine of frustration under *Section 56 of the Indian Contract Act, 1872*. In order to raise the same, parties must show that the performance of a contract has become impossible, and the conditions have become basically different from those envisaged in the contract. The parties also have the option to invoke several clauses such as price adjustment clauses, limitation or exclusion clauses, material adverse change clauses, and many others such clauses in order to limit the liabilities arising from non-performance or the partial performance of the contractual obligations. The ability to invoke such grounds would depend on the drafting of the Contracts, the application of case-laws on these clauses, and how these clauses would be interpreted by the tribunals, courts, and other adjudicatory bodies.

C. DOCTRINE OF FRUSTATION AND FORCE MAJEURE CLAUSE

It was recognized by the English Courts in *Taylor v. Caldwell* that ‘The doctrine of frustration as a rule relied upon for termination of the contract unlike the concept of Force Majeure which is for suspension of the obligation.

- ***Doctrine of Frustration*** applies where the performance of a contract becomes impossible by reason of subsequent events. It applies as a matter of law to all countries. Doctrine of Frustration operates to discharge the contract and exculpate the parties from subsequent breach.
- ***Force Majeure*** is a specific contract clause. It only applies where the parties have elected to incorporate it within the contract. Although its effect is broadly similar to frustration, but it does not normally terminate the contract.

D. Even the Government of India analysis force majeure clause by some of notification, they are-

- i. ***It is to be noted that the Govt. of India vide its Memo No. F. 18/4/2020 PPD dated 19-02-2020 issued by the Deputy Secretary of Govt. of India, Ministry of Finance states as follows:*** "A doubt has arisen if the disruption of the supply chains due to spread of corona virus in China or any other country will be covered in force majeure clause. In this regard it is clarified that it should be considered as a case of natural calamity and force majeure²⁰.
- ii. ***The Ministry of New & Renewable Energy vide Office Memorandum bearing no. 283/18/2020-GRID SOLAR dated March 20, 2020:*** has again termed the occurrence of Covid-19 as a Force Majeure Event²¹.
- iii. ***The Ministry of New & Renewable Energy vide Office Memorandum bearing no. F. No. 283/18/2020-GRID SOLAR dated April 17, 2020:*** has reiterated the occurrence of Covid-19 as a Force Majeure Event²².

However, such government notifications are only restrictive in nature. If we see the bottom line as to whether the party can have the benefit of force majeure or not shall depend on the contractual provisions. The events constituting force majeure event stipulated in the contract shall be considered to determine whether the performance of the contract may be suspended or will stand frustrated.

E. JUDICIAL PRECEDENT-

- ***Energy Watchdog v. Central Electricity Regulatory Commission***

In this case, it was clearly laid down that only those events, which are explicitly included in the contract, can excuse a party from performance. It is pertinent to note that the force majeure clause did include 'epidemics' in number of contracts between the parties. In this case, it was propounded that parties can invoke the doctrine of frustration and seek discharge from performance if they can validate, that performance of doing such an act will be impossible, keeping in consideration the object and purpose required and intended to be achieved at the time parties signed the contract²³.

- ***Standard Retail Pvt. Ltd. v. M/s. G. S. Global Corp & Ors***

The recent order passed by the Bombay High Court on Apr. 08, 2020 in this case, is,

²⁰ Government of India Ministry of Finance Department of Expenditure Procurement Policy Division, (Feb. 19, 2020), doe.gov.in/sites/default/files/Force%20Majeure%20Clause%20-FMC.pdf.

²¹ Government of India, Ministry of New and Renewable Energy, (Mar. 26, 2020), <https://mnre.gov.in/public-information/current-notice>.

²² Ibid.

²³ Energy Watchdog v. Central Electricity Regulatory Commission (2017) Civil Appeal Nos.5399-5400 of 2016.

remarkably, the first case where an Indian Court while dismissing a Commercial Arbitration petition, has held that the “lockdown cannot come to the rescue of the Petitioners so as to abandon from their contractual obligations.” In other words, a lockdown in these exceptional times, is not a legal basis for termination or repudiation of a contract²⁴.

F. SOME IMPORTANT PRINCIPLES DERIVED FROM JUDICIAL RECEDENTS, LAEGISLATURES AND GOVERNMENT NOTIFICATIONS-

The authors after researching on Force Majeure clause derived some of the principles which are-

i. When a contract contains a force majeure clause which applies to the facts of the case by the Court, Section 56 of the Indian Contract Act, 1872 will not apply and Section 32 of the Indian Contract Act, 1872 will apply.

ii. If the contract does not contain force majeure clause then Section 56 of the Indian Contract Act, 1872 to apply.

iii. A party to the contract cannot be relieved from the performance of a contract merely because performance may become burdensome to such party due to an unforeseen turn of events.

iv. The language in the force majeure clause will be reviewed carefully. When the clause contains general or the residuary language, it will be read with the words which precede and follow it. The overall nature and general terms of the contract will also be considered in interpreting.

IV. CONCLUSIONS AND SUGGESTIONS-

In light of the existing jurisprudence as it stands, the aforementioned exceptional conditions may just bring about case in a catena of commercial contracts. It is then a matter of interpretation by the courts whether a contract containing force majeure clause would cover such limits in movement and lock downs imposed by the Government. The recent interim Order of the Hon'ble High Court of Delhi in *M/s Halliburton Offshore Services Inc. v. Vedanta Limited*²⁵ is certainly a step in advancing the jurisprudence towards this path. However, the need of the hour is that instead of having bit by bit notifications, we need to have a codified law which excludes an affected party from performing its obligations under the contract during

²⁴ *Standard Retail Pvt. Ltd. v. M/s. G. S. Global Corp & Ors* (2020) COMMERCIAL ARBITRATION PETITION (L) NO. 404 OF 2020.

²⁵ *M/s Halliburton Offshore Services Inc. v. Vedanta Limited*, (2020) O.M.P (I) (COMM) 88/2020 and I.A. 3696/2020, 3697/2020.

the period of such lock downs and such lock downs have to be considered as force majeure.

In the times of Corona Pandemic, some of the safeguards to be resorted in commercial contracts, some of them are:-

- Review the contract in which the force majeure clause exists and analyzes the appropriate factors and incidents mentioned to initiate the '*Rule to excuse*'.
- Ensure 'all' or 'any' notification procedure as prescribed in the conditions of the contract.
- Both the parties to the Contract mutually analyze the impact of the outbreak of COVID-19 on the contract and its performance.
- Initiate a chance to perform the contract in a possible alternative way.
- Collect evidences to accord non-performance of the obligation to the sole force majeure event, in the current scenario, the pandemic Covid-19.

All records with respect to unavoidable additional expenditure incurred must be maintained by the parties to the contract.
